ORIGINAL

No. 87-5570

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LOIS E. HILTON FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court's decision to authorize the magistrate to preside over the voir dire constituted plain error in the circumstances of this case.

2. Whether petitioner violated 18 U.S.C. 1001 by covering up a fact material to the General Services Administration when she presented a check as payment for several surplus government motor vehicles and made the implicit representation that the check was backed by sufficient funds when she in fact knew that the check was not backed by sufficient funds.

3. Whether the proof at trial varied impermissibly from the indictment because a vehicle identification number in the indictment did not correspond precisely to the actual number of one of the vehicles purchased by petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-5570

LOIS E. HILTON FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 824 F.2d 1430. The prior opinion of the court of appeals panel is reported at 797 F.2d 1329.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1987. The petition for a writ of certiorari was filed on September 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). 1/

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to steal property owned by the United States, in violation of 18 U.S.C. 371; two counts of theft of United States property, in violation of 18 U.S.C. 641; and concealment of a fact material to the General Services Administration, in

---

1/ Petitioner's application for a stay of execution of the court of appeals' mandate was denied by Justice White. See No. A-331 (Nov. 4, 1987).

violation of 18 U.S.C. 1001. She was sentenced to concurrent terms of three years' imprisonment on three counts, followed by a consecutive three-year term--which was suspended in favor of probation--on the remaining theft of property count. 2/

1. The evidence adduced at trial, which included admissions made by petitioner during the course of a conversation with a government investigator (3 Tr. 148-157), showed that petitioner and others knowingly gave worthless checks as payment for surplus vehicles offered for sale by the General Services Administration (GSA).

The GSA sells surplus vehicles by inviting prospective purchasers to submit bids to the government (2 Tr. 22-26). Bidders must expressly agree to comply with the terms of the sale and to pay for and remove the property (2 Tr. 28). The government accepts the highest eligible bid and notifies the successful bidder by a "notice of award" that serves as a sales contract (2 Tr. 27-28).

Petitioner and her co-conspirators set up several companies for the wholesale distribution of automobiles and opened commercial checking accounts in the names of those businesses (3 Tr. 86-87, 105-106, 123, 152, 164, 211). The conspirators submitted bids on surplus government vehicles through those companies and, when their bids were accepted, wrote checks to the government on company checking accounts knowing that the accounts did not contain sufficient funds to cover the checks (3 Tr. 165-171, 178-180, 194; 4 Tr. 4-5). Thus, on April 21, 1981, petitioner submitted a check to the GSA as payment for two vehicles; that check subsequently was returned to the government for insufficient funds (2 Tr. 57-63; 3 Tr. 38, 92-93). Several

---

2/ Petitioner was indicted along with her former husband, Owen Hilton; her stepson, Barry Hilton; and Billie Ruth Van Huss. Owen Hilton and Van Huss pleaded guilty before trial. Barry Hilton was convicted on all counts at trial; he did not seek review of his convictions in the court of appeals.

months later--on July 15, 1981--petitioner drew a check on the Ford Equipment Company account as payment for four vehicles on which she had successfully bid; that check also was returned to the government for insufficient funds (2 Tr. 80, 85-86, 88; 3 Tr. 44-45, 107-108). Petitioner admitted that she was aware at the time she drew the check that the account did not contain sufficient funds (3 Tr. 148; 4 Tr. 34). In both instances, the vehicles were released to petitioner upon delivery of the checks (3 Tr. 43-45).

The conspirators obtained title to all six vehicles and resold three of them; no effort was made to repay the government with the proceeds of those sales (3 Tr. 64-67, 76-77, 112, 153-154, 156-157; 4 Tr. 80-81, 87, 100). After the checks were returned for insufficient funds, petitioner neither returned the vehicles to the government nor made any further effort to pay the government.

2. Judge David O. Belew, Jr., of the United States District Court for the Northern District of Texas was assigned to preside over petitioner's trial. On the morning that jury selection was scheduled to begin in petitioner's case, Judge Belew was not available because he was presiding over a trial that had not yet concluded. Judge Belew asked Magistrate Alex McGlinchey to preside over the jury selection in petitioner's case so that the trial could start when Judge Belew became available (9/16/85 Tr. 2). Petitioner did not raise any objection to the magistrate's participation in the voir dire proceeding.

The magistrate introduced himself to the venire, explained the upcoming voir dire proceeding (9/16/85 Tr. 2-3, 8-10) and described the pending charges (id. at 3-5). He introduced the defendants, the case agent, and the attorneys, identifying the United States Attorney's office and the law firms with which the defense counsel were associated (id. at 5-8). The magistrate also identified the prospective government witnesses (id. at 52-

53). At the magistrate's request, members of the venire introduced themselves, identified the members of their families, listed their occupations and the occupations of their spouses, and recounted any prior experiences as jurors (id. at 8-29). The magistrate then asked those prospective jurors currently or formerly employed by the government, and those whose private business activities involved substantial dealings with the government, whether that relationship would affect their ability to be fair and impartial (id. at 29-38, 50-52). The magistrate also directed the venire to consider their prior experiences as victims of crime and as receivers of checks returned for insufficient funds, again probing whether they would be able to remain fair and impartial in the present case (id. at 38-46). The magistrate asked the prospective jurors whether they had ever been involved in a lawsuit as litigants or witnesses, and whether those experiences would affect their ability to serve as jurors (id. at 46-50).

The magistrate then inquired whether any member of the panel was biased in favor of the government or would attach more credence to government witnesses' testimony, and whether any would give greater weight to the testimony of a law enforcement officer because of his official capacity (9/16/85 Tr. 53-54). He comprehensively instructed the venire on the burden of proof and the presumption of innocence, and he asked the jurors whether they would be able to follow the law concerning those standards (id. at 54-55). He explained that the indictment was not evidence of guilt, and he questioned whether the jurors believed otherwise (id. at 55). He explained that the defendants were not required to testify, and he asked whether the jurors would infer guilt from a defendant's choice not to testify (id. at 56). He inquired whether "anyone of you know any reason why, after you have heard the evidence in this case, received the instructions of Judge Belew as to the law, that you could not render a fair

and impartial verdict both to the government and to the defendants based wholly and solely on the evidence admitted" at trial (id. at 56). The magistrate explained the different types of evidence, that the function of the jury is to determine factual matters including the credibility of witnesses (id. at 57-58), and that statements, arguments and questions by lawyers are not evidence (id. at 3, 57). He described the jurors' obligation to not read about, listen to accounts of, or discuss the case with each other or outsiders (id. at 58-60).

The magistrate then asked counsel if they wished to propose any other questions for him to propound to the venire; none were proposed. Next, the magistrate gave both sides an opportunity to address the panel. 9/16/85 Tr. 61. The prosecutor described the law of conspiracy and asked if any prospective juror was troubled by the concept that an individual could be convicted for conspiracy as a separate crime (id. at 68-69); he also asked if "anyone * * * for any reason feels that they couldn't sit on a case and listen to the evidence on this case today, or starting Wednesday and listen to the evidence and reach a verdict under the law and the evidence as the Court's charge will give" (id. at 71). Counsel for petitioner then addressed the venire (id. at 71-73). She asked whether any prospective jurors knew any other jurors on the array (id. 73), as well as whether anyone had a reason to believe he could not be fair and impartial (id. at 75). Counsel for petitioner's co-defendant, Barry Hilton, also availed himself of the opportunity to address and question the prospective jurors (id. at 75-81).

During the course of the voir dire, counsel for petitioner and counsel for Barry Hilton requested that one juror be stricken for cause (9/16/85 Tr. 31). The magistrate agreed to strike the juror (id. at 34, 84). Counsel for co-defendant Hilton sought the removal for cause of another juror, who stated that she might have some difficulty applying the concept of circumstantial

evidence because there were unresolved questions concerning the death of her son in a robbery the previous year (id. at 62-68). Petitioner's attorney, however, expressly declined to challenge the juror for cause (id. at 68), and the magistrate overruled co-defendant Hilton's request (id. at 68, 84). 3/

The magistrate informed defense counsel that if they chose to exercise their peremptory challenges jointly, they would be permitted 12 challenges rather than the ten challenges authorized in Fed. R. Crim. P. 24(b) (9/16/85 Tr. 82-83). Petitioner and her co-defendant elected to exercise their challenges jointly, the parties exercised their peremptory challenges, and the jury was selected (id. at 86).

Two days later, the district judge presided over the swearing-in of the jury and instructed the jurors on the purpose of the indictment, the presumption of innocence and burden of proof, the trial process, the jury's function as factfinder, and the jurors' obligation to avoid both discussing the case among themselves and talking to parties, lawyers, or witnesses during the pendency of the trial (2 Tr. 2-5). Petitioner did not complain to the district judge about the fact that the magistrate had presided over the jury selection, nor did she object to any aspect of the voir dire itself.

3. A three-judge panel of the court of appeals affirmed petitioner's convictions (Pet. App. B 1-16). The panel first rejected petitioner's contention that the magistrate's participation in the jury voir dire violated both the Federal Magistrates Act, 28 U.S.C. 636, and the Constitution (Pet. App. B 3-10).

The panel next turned to petitioner's challenge to her conviction under 18 U.S.C. 1001. The indictment alleged that

---

3/ The majority of the en banc court noted the "defense challenge for cause" (Pet. App. A 4, 5) but did not explain that petitioner had not sought the removal of this juror.

petitioner "covered up a material fact to the General Services Administration" by creating a situation in which it appeared to the GSA that petitioner's check was covered by sufficient funds when petitioner in fact knew that there were not sufficient funds in the account. Petitioner asserted that the conviction could not stand because Section 1001 required the government to show that petitioner had made a specific affirmative representation as to the sufficiency of the funds in the checking account at the time she presented the check as payment for the surplus vehicles.

Petitioner based her claim upon Williams v. United States, 458 U.S. 279 (1982), in which this Court held that presentation of a check backed with insufficient funds did not violate 18 U.S.C. 1014, which provides in pertinent part that it is a crime to "knowingly make any false statement for the purpose of influencing in any way the action of" specified federal agencies. The Court stated that "[a]lthough petitioner deposited several checks that were not supported by sufficient funds, that course of conduct did not involve the making of a 'false statement,' for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'" (458 U.S. at 284).

The court of appeals panel in the present case observed that the portion of 18 U.S.C. 1001 that formed the basis for this count of the indictment against petitioner does not simply refer to "false statements" but encompasses "knowingly and willfully * * * covering up by any trick, scheme or device a material fact." The court concluded that this broader language rendered Williams inapplicable; where a defendant is shown to have concealed a material fact by "'ruse or artifice, by scheme or device,'" a violation of this provision may be made out (Pet. App. B 14 (footnote and citation omitted)). Because the evidence showed that petitioner participated in a scheme that involved the

creation of bank accounts for the purpose of tricking the government into believing that petitioner had sufficient funds to purchase the surplus vehicles, the court held that the statutory requirement was satisfied (id. at 14-15).

The panel also rejected petitioner's claim that there was an impermissible variance between Count 5 of the indictment and the proof adduced at trial. Count 5 alleged a theft of property of the United States, in violation of 18 U.S.C. 641, and described the stolen property as a 1978 Dodge pick-up with the vehicle identification number "D14AE815227389." The evidence at trial showed the taking of a vehicle as described in the indictment, with the exception that the vehicle's identification number was "D14AE8S227389." The panel observed that "[a] mere variance in proof that does not affect the substantial rights of the accused will not warrant setting aside a conviction," and stated that "[i]f the allegation and proof 'substantially correspond,' the conviction is valid" (Pet. App. B 15 (footnotes omitted)). Because petitioner "had adequate notice that she was charged with theft of the particular vehicle described," the panel affirmed the conviction (id. at 15-16).

4. The full court of appeals sua sponte granted rehearing en banc to consider whether a federal magistrate may conduct jury voir dire in a criminal case. 4/ A majority of the en banc court concluded that Congress did not intend to permit magistrates to perform that duty, but the court also determined that the absence of any objection by petitioner subjected the claim to plain error analysis. Persuaded that the voir dire proceeding was not

---

4/ Petitioner's petition seeking rehearing by the court of appeals panel was denied. She then filed a petition for a writ of certiorari in this Court; that petition was denied after the court of appeals issued its order setting the case for rehearing en banc. See No. 86-5865 (Jan. 27, 1987).

fundamentally unfair, the majority found the error to be harmless beyond a reasonable doubt. Pet. App. A. 5/

The court reviewed the legislative history of the magistrate statute (Pet. App. A 5-11) and noted that constitutional concerns had been expressed with regard to the delegation of duties to magistrates (id. at 6). The court acknowledged that the statute contains a "catch-all" provision permitting magistrates to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States" (28 U.S.C. 636(b)(3)), but found that this provision must be interpreted with reference to the concerns expressed in the debate over the statute's other provisions. It concluded that Congress did not intend "to grant to district judges the power to delegate [to magistrates] the trial of felony cases themselves" (id. at 14). The court then determined that jury selection could not be separated from the trial itself: "we see the selection of the jury as an essential component of the trial itself 'because the impartiality of the adjudicator goes to the very integrity of the legal system'" (id. at 15 (citation and footnote omitted)).

The court further stated that even if jury selection were viewed as a pretrial matter, "the difficulties of review by an article III judge of a magistrate's rulings in jury selection--and the absence of a statutory procedure for that review in the face of explicit review procedures for other pretrial matters--leaves us unconvinced that Congress intended to allow delegation of this important task" (Pet. App. A 15). The court noted "the unique importance of sight and sound in the nigh intuitive judgments of a trial judge's rulings in the course of voir dire," concluding that "[a]n effort to engage in de novo review would be difficult and often impossible" (id. at 20). The court observed

---

5/ The full court of appeals reinstated the panel's determinations regarding petitioner's other claims. Pet. App. A 3.

that a second voir dire before the district judge "may never capture the original scene" and would be "a delicate exercise at best" (ibid. (footnote omitted)). It concluded that "we ought not lightly attribute to Congress the purpose to enter this thicket with no provision for review, whether or not these practical problems might be surmounted" (id. at 20-21).

Despite its conclusion that the district court erred in allowing the magistrate to preside over the selection of the jury, the court of appeals declined to vacate petitioner's convictions. Because petitioner "did not object and because the trial was fundamentally fair," the court affirmed the convictions (Pet. App. A 25).

Judge Jolly concurred in the result. (Judge Jolly's opinion is not included in the appendix to the petition; it appears in the appendix to petitioner's stay application). He stated that a magistrate's decisions during voir dire must be subject to effective review by a district judge, but he rejected the majority's conclusion that such review would be impossible in all cases. Concluding that the problems of providing for review were not, "in the vast majority of cases, insurmountable," Judge Jolly rejected the majority's per se rule against the conduct of voir dire by magistrates as "a much too stringent solution that deprives the district courts of some helpful flexibility in the utilization of magistrates" (App. A 2). He concluded that the Fifth and Sixth Amendments permitted a defendant to insist that voir dire be conducted by a district judge, but that a defendant may "decide that his rights are fully protected at voir dire by a magistrate" and consent to voir dire conducted by the magistrate.

Four judges dissented from the majority's conclusion that magistrates may not conduct voir dire. Turning first to the statutory issue, the dissenting judges concluded that the statute's catch-all provision authorized a district judge to delegate to a magistrate the responsibility of presiding over

voir dire. They noted that the plain language of the statute was extremely broad, that the legislative history indicated that Congress intended to permit experimentation in the use of magistrates, and that every other court of appeals to consider the question had concluded that this provision permits district judges to delegate to magistrates the duty of presiding over voir dire (Pet. App. A 3-7).

The dissenting judges next rejected the majority's contention that voir dire is so closely intertwined with the trial itself that it may not be supervised by a magistrate. They observed that "certainly an evidentiary hearing on a motion to suppress evidence is at least as important; for it may determine the result," and that this Court in United States v. Raddatz, 447 U.S. 667 (1980), held that a magistrate may conduct an evidentiary hearing on a suppression motion (Pet. App. A 10). They also observed that voir dire was less closely related to the trial than other tasks routinely performed by both magistrates and clerks (id. at 12-16).

The dissenting judges also disputed the majority's conclusion that a district judge cannot effectively review the magistrate's decisions during the voir dire, concluding that "[r]eview of magistrate-conducted voir dire * * * appears no less adequate than review of magistrate-conducted suppression hearings" (Pet. App. A 20). They observed that "when a magistrate conducts voir dire, the trial judge retains the discretion to review the questions asked, and to question the juror again on his own"; and that a court "may choose to institute rules that require the district judge to be available when a magistrate conducts voir dire so that the judge can review contested rulings in court at the time the dispute arises and observe the prospective juror's demeanor" (ibid. (footnotes omitted)). They noted that such rules were not essential to upholding the constitutionality of this practice, and that they

were not relevant here because there was no issue as to the credibility of any prospective juror. Because oversight by the district judge has not been found to be a problem in the cases presenting challenges to magistrate-conducted voir dire, the dissenting judges stated that "[t]he hypothetical slippery slopes posed by the majority should not be the basis for depriving district judges of the power Congress has expressly given them" (id. at 21).

ARGUMENT

Although the first issue raised by petitioner--the authority of magistrates to conduct jury voir dire proceedings in federal criminal cases--is an important issue that will likely warrant review by this Court in an appropriate case, this is not the case in which to review the issue, because petitioner failed to preserve that claim in the district court, and because no court has held that such a claim is cognizable under the plain error standard. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 8-10) that the court of appeals was required to vacate her convictions because a magistrate presided over the voir dire. The court of appeals concluded that magistrates are not authorized to conduct voir dire, but declined to vacate petitioner's convictions "because [petitioner] did not object [to the magistrate's role] and because the trial was fundamentally fair" (Pet. App. A 25).

a. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Every court of appeals to consider the question has agreed with the court below that permitting a magistrate to conduct voir dire is not plain error. See United States v. DeFiore, 720 F.2d 757, 765 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984); United States v. Rivera-Sola, 713

F.2d 866 (1st Cir. 1983); Haith v. United States, 342 F.2d 158 (3d Cir. 1965) (per curiam); see also United States v. Bezold, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986) (holding that neither the magistrate statute nor the Constitution bars magistrates from conducting voir dire).

That conclusion is clearly correct. The plain error rule "authorizes the Courts of Appeals to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings'" (United States v. Young, 470 U.S. 1, 15 (1985) (citations omitted)). The rule "is to be 'used sparingly, solely in the circumstances in which a miscarriage of justice would otherwise result'" (ibid. (citation omitted)). The error found by the court of appeals here--that the magistrate stepped beyond his congressionally-authorized role--does not constitute an egregious error of the sort congnizable under the plain error rule.

The only error found by the court of appeals was a violation of a congressional limitation upon the magistrate's authority. 6/ Petitioner herself has never raised any challenge to the manner in which the magistrate conducted the voir dire proceeding: she presumably would have no complaint if a district judge had said and done exactly what the magistrate did here. Where a defendant raises no challenge at all to the substance of the voir dire, and the only asserted error is that the presiding officer was a magistrate rather than a district judge, it is impossible to characterize the error as one that goes to the "fairness, integrity or public reputation" of the proceeding. The claim has no relationship to fairness at all, because

---

6/ The court of appeals expressly declined to hold that magistrate-conducted voir dire violates the Constitution (see Pet. App. A 14). This case therefore does not raise the question whether the plain error rule applies to constitutional errors, a question that is now before the Court in United States v. Robinson, No. 86-937 (argued Nov. 3, 1987).

petitioner does not argue that the jury that was chosen during voir dire differed in any way from the jury to which she was entitled under the Constitution and relevant statutes. 7/

b. We submit that petitioners' convictions should be upheld for the additional reason that there was no error here: neither the federal magistrate statute nor the Constitution bars magistrates from conducting voir dire. 8/

First, the authority to conduct jury voir dire clearly falls within the powers granted to magistrates in the Federal Magistrates Act, 28 U.S.C. 636. Section 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not

---

7/ If petitioner had objected to the magistrate-conducted voir dire and subsequently challenged a discretionary determination made by the magistrate during voir dire on the ground that petitioner was entitled to have the relevant discretion exercised by an Article III judge, perhaps a sufficient claim of error would be made out. Petitioner, of course, satisfies neither of these requirements.

Petitioner suggests (Pet. 9) that the court of appeals' decision means that "a trial court could designate the plumber who stopped by to fix the sink to select the jury in a criminal trial and so long as the litigants could not point to some action or actions on the part of the plumber which deprived the accused of a fair trial, then the harmless error rule could be used to sustain the conviction." Petitioner's example is inapposite. First, an objection by one of the parties would be much more likely in the event a complete stranger arrived to preside over the voir dire; in that situation, the plain error rule would not apply. Second, a magistrate is a judicial officer, a plumber is not. Other considerations not applicable in the present case--such as the interest in protecting the public reputation of judicial proceedings--might weigh in favor of a finding of plain error where the individual presiding over voir dire was not a judicial officer at all. Compare Tumey v. Ohio, 273 U.S. 510 (1927) (harmless error rule does not apply to claim that defendant was tried before a judge with a financial stake in the outcome).

Petitioner relies upon this Court's decision in Gray v. Mississippi, No. 85-5454 (May 18, 1987), holding that the harmless error rule does not apply when a prospective juror in a death penalty case is excluded on the basis of an erroneous application of Witherspoon v. Illinois, 391 U.S. 510 (1968). But that case involved a challenge to a substantive decision made during the voir dire proceeding; no such issue is presented here. In addition, the special Eighth Amendment concerns applicable in death penalty cases are not relevant here.

8/ Should this Court grant the petition for a writ of certiorari, we intend to rest our defense of the court of appeals' judgment primarily upon this ground. See United States v. New York Telephone Co., 434 U.S. 159, 165-166 & n.8 (1977).

inconsistent with the Constitution and laws of the United States." Congress intended this broad grant of authority to "enable[] the district courts to continue innovative experimentation in the use of this judicial officer. * * * [P]lacing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates." S. Rep. 94-625, 94th Cong., 2d Sess. 10 (1976); see also H.R. Rep. 94-1609, 94th Cong., 2d Sess. 12 (1976). This expansive grant of authority clearly empowers a district judge to direct a magistrate to conduct voir dire. See United States v. Bezold, supra; Pet. App. A 4-7 (dissenting opinion); Administrative Office of United States Courts, Legal Manual for United States Magistrates § 3.09 (conducting voir dire is one of the duties that may be delegated to magistrates). 9/

Magistrates also are authorized to conduct voir dire by the provision of the Magistrates Act stating that "a [district] judge may designate a magistrate to hear and determine any pretrial matter pending before the court" (28 U.S.C. 636(b)(1)(A)). The Senate Report explains that this provision is intended to authorize magistrates to perform the functions enumerated by Chief Judge Belloni of the District Court for the District of Oregon in his testimony before the Senate committee. S. Rep. 94-625, supra, at 7; accord, H.R. Rep. 94-1609, supra, at 9. Chief Judge Belloni testified that in the District of Oregon the magistrate performed a number of functions including "presid[ing] over the voir dire and jury selection of a trial to begin

---

9/ The court of appeals' contrary interpretation of the statute simply ignores the provision's plain language and legislative history. In addition, the court's decision is logically flawed. The court concluded that Congress did not intend to allow magistrates to preside over felony trials and then determined--without any reference to congressional intent--that voir dire is sufficiently a part of the trial to fall within this supposed congressional intent. In fact, as we discuss in the text below, Congress apparently viewed voir dire as a pretrial matter falling within the purview of magistrates.

momentarily before a [district judge]." Jurisdiction of United States Magistrates: Hearing on S. 1283 Before a Subcomm. of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 39 (1975). Congress thus intended this provision to authorize magistrate-conducted voir dire.

Second, magistrate-conducted voir dire does not violate Article III of the Constitution. In United States v. Raddatz, 447 U.S. 667 (1980), this Court rejected a constitutional challenge to the the Magistrates Act similar to the claim in the present case. The Court held that a district court may decide a suppression motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and conclusions of law. The Court rejected the defendant's Article III challenge because the magistrate's actions with respect to the suppression motion took place "under the district court's total control and jurisdiction" (447 U.S. at 681).

The principle applied in Raddatz demonstrates the constitutionality of magistrate-conducted voir dire because in this context the district court also remains in control of the voir dire process. Here, for example, there is no indication that the district judge would not have been available to resolve complaints about either the process of jury selection or the magistrate's decisions regarding particular prospective jurors, and it was the district court that swore in the jury. The appointment of the magistrate to oversee the voir dire therefore did not violate Article III. United States v. Bezold, supra; United States v. Rivera-Sola, 713 F.2d at 874; cf. United States v. Saunders, 641 F.2d 659, 663-664 (9th Cir. 1980), cert. denied, 452 U.S. 918 (1981) (upholding magistrate's supervision of jury deliberations because magistrate's actions were subject to de novo review by the district court). 10/

10/ The court of appeals stated (Pet. App. A 14-19) that voir dire is part of the trial and that Raddatz is therefore (Continued)

Moreover, the general management, composition, and operation of the magistrate system is under the control of Article III judges. United States v. Raddatz, 447 U.S. at 685-686 (Blackmun, J., concurring); Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 544-546 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 824 (1984); see also United States v. Leon, 468 U.S. 897, 917 n.18 (1984) ("[f]ederal magistrates * * * are subject to the direct supervision of district courts"); 28 U.S.C. 636(b)(4) (district courts "establish rules pursuant to which the magistrates shall discharge their duties"). Thus, as in Raddatz, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without the judicial department" (United States v. Raddatz, 447 U.S. at 686 (Blackmun, J., concurring)). The conduct of voir dire by a magistrate accordingly does not pose "the threat to the judicial power or the independence of judicial decisionmaking * * * that Article III is designed to prevent" (ibid.).

Finally, the procedure here does not violate Article III for the additional reason that Article III would permit the delegation to a magistrate of authority to conduct the jury voir dire with only deferential review by the district court. This Court has observed that "[v]ery early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protection prescribed for federal judges in Art. III." Palmore v. United States, 411 U.S. 389, 402 (1973); see Warren, Federal Criminal

---

inapplicable. However, as this Court has observed (see Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 n.8 (1984)) "trial" is defined differently for different purposes. See also United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (a defendant is placed in jeopardy for purposes of the Double Jeopardy Clause "when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence"). The fact that some rights that apply to the trial also are available during voir dire therefore does not mean that the voir dire is part of the trial for all purposes. As the dissenting judges below observed (Pet. App. A 10-16), the suppression hearing at issue in Raddatz shares more of the characteristics of a trial than jury voir dire.

Laws and the State Courts, 38 Harv. L. Rev. 545, 551-553, 570-572 (1925); Act of Mar. 2, 1799, ch. 43, Sections 14, 15, 20 and 28,1 Stat. 733, 936-940. Thus, "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts" (Swain v. Pressley, 430 U.S. 372, 382-383 (1977) (footnote omitted)). 11/

Accordingly, all facets of a criminal proceeding need not be presided over by an Article III judge. For example, an arrested person makes his first appearance before a magistrate (Fed. R. Crim P. 5), a magistrate may preside over arraignments, and a magistrate may determine motions to dismiss or quash an indictment or information (28 U.S.C. 636(b)(1)). 12/ As is the case with these proceedings collateral to the trial on the merits, the jury voir dire may be presided over by a magistrate. 13/

11/ The dissenting judges below observed (Pet. App. A 22) that challenges for cause may not have been heard by judges at common law.

12/ Moreover, a federal prosecution in an Article III court may be based in part upon factual findings by an Article I tribunal. Estep v. United States, 327 U.S. 114 (1946).

13/ The court of appeals suggested (Pet. App. A 18-20) that the district judge would not as a practical matter be able to review the magistrate's voir dire determinations. The court noted the important role that credibility often plays in those determinations. This Court rejected a virtually identical claim in Raddatz, holding that due process did not require a district court deciding a suppression motion to hear the testimony of the witnesses at the suppression hearing, even if the motion turned upon issues of credibility (447 U.S. at 677-681). The Raddatz Court observed that the district court retained the option of hearing the witnesses if that course of action is desirable. The same analysis applies here--the district judge can review the voir dire proceedings and can reopen the proceedings to question prospective jurors if he deems it necessary to make his own credibility determinations. See Pet. App. A 20-21 (dissenting opinion). As the dissenting judges below stated, "[d]epending on the procedure followed, adequate superintendence of the magistrate's conduct of voir dire by the district judge might be difficult in some cases. No problems arose here. None has arisen in any of the other cases in which the magistrate has been permitted to conduct voir dire. The hypothetical slippery slopes posed by the majority should not be the basis for depriving district judges of the power Congress has expressly given them" (id. at 21).

2. Petitioner contends (Pet. 10-11) that the court below erred in affirming her conviction under 18 U.S.C. 1001. The indictment charged that petitioner covered up a fact material to the General Services Administration when she presented a check as payment for four vehicles and made the implicit representation that the check was backed by sufficient funds when she in fact knew that the check was not backed by sufficient funds. See Pet. App. C 8. Petitioner does not dispute that she presented the check with the knowledge that it was not covered by sufficient funds. She contends that she did not violate the statute because the presentation of the check did not constitute a representation that the account contained funds sufficient to cover the check.

Petitioner relies upon this Court's opinion in Williams v. United States, 458 U.S. 279 (1982), but, as the court of appeals pointed out (App. B 12-13), Williams does not address the question presented here. The Court in that case held that an individual does not make a "false statement" to a bank within the meaning of 18 U.S.C. 1014 when he presents for deposit a check that is not backed by sufficient funds. The Court stated that, "technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'" (458 U.S. at 284).

This case differs sharply from Williams because petitioner was not convicted on the ground that her bad check constituted a false statement to the GSA. The allegation is that petitioner covered up a material fact--that the check was not backed by sufficient funds--by representing that the check was backed by sufficient funds. And the proof of that representation was not simply the presentation of the check. As the court of appeals stated, petitioner "did not merely give the Government a check knowing that there were not funds sufficient to cover the amount in the account. She joined the other defendants in a scheme pursuant to which bank accounts were opened in the names of

companies that existed only for the purpose of issuing checks, vehicles were purchased with checks drawn on these company accounts, and the defendants not only knew that the accounts had insufficient funds but had the intent not to honor the checks. These actions constitute a 'trick, scheme, or device' to 'cover up a material fact' to a government agency" (Pet. App. B 14-15 (footnote and citation omitted)). Thus, petitioner and her co-defendants engaged in an entire course of conduct designed to create the impression that the checks were drawn on the accounts of reputable businesses and, accordingly, were likely to be backed by sufficient funds.

Moreover, the presentation of the bad check followed the government's formal acceptance of petitioner's bids. Those bid proposals included a representation that the bidder agreed to comply with the terms and conditions of the sale, including his obligation to pay the agreed price (2 Tr. 28). Viewing petitioner's submission of the check in connection with her purchase of the four vehicles as the culmination of her business negotiations with the government, the silent presentation of that check clearly constituted an implied representation that the check was covered by sufficient funds.

3. Petitioner asserts (Pet. 11-12) that the government's proof at trial varied impermissibly from the offense alleged in Count 5 of the indictment. The indictment alleges that on or about July 23, 1981, petitioner willfully and knowingly embezzled, stole, and purloined "one 1978 Dodge Pickup truck, bearing Vehicle Identification Number D14AE815227389" (Pet. App. C 8 (emphasis added)). The evidence at trial showed that the 1978 Dodge pickup truck petitioner purchased from the government in fact bore the identification number D14AE8S227389. In other words, the indictment inserted the number "15" in place of an "S"

in the middle of the VIN number. 14/

The court of appeals was entirely correct in concluding (Pet. App. B 15-16) that petitioner had adequate notice of the particular Dodge pickup truck that was the subject of the charges against her. The court therefore properly concluded that the minor variance in the VIN number was not material. Even had no other allegations in the indictment focused on the particular truck at issue, the typographical error would not have required reversal of petitioner's conviction. See United States v. Wells, 525 F.2d 974, 975 (5th Cir. 1976); United States v. Davis, 431 F.2d 713 (4th Cir. 1970); United States v. Wenner, 417 F.2d 979, 982 (8th Cir. 1969), cert. denied, 396 U.S. 1047 (1970); Shaw v. United States, 392 F.2d 579 (9th Cir. 1969).

Moreover, this indictment plainly satisfies the requirement that petitioner be able to plead her conviction as a bar to future prosecution. Overt Act 8 of the conspiracy count identifies the date on which petitioner submitted a bid for the Dodge pickup truck, as well as the item number assigned to the truck by the General Services Administration; Count 4 identifies the account number out of which the check for purchase of the truck was written; and Count 5 alleges the approximate date on which petitioner obtained the truck (Pet. App. C 5,8). When read as a whole and in a common sense fashion, therefore, the indictment plainly gave petitioner adequate notice of the charge against her and will permit her to establish a double jeopardy bar to any future prosecution.

14/ Overt Acts 8 and 11 of Count 1 of the indictment also refer to the 1978 Dodge pickup truck. The VIN listed in those acts is D14AE85227389 (Pet. App. C 5 (emphasis added)). In other words, where the substantive count contains the number "15," the conspiracy count contains the number "5." The change from "S" in the actual VIN to "5" in the indictment is plainly a typographical error. And, as a witness from the General Services Administration explained at trial, because the VINs contain so many digits, it is not unusual that there are typographical errors in the forms listing the VIN numbers (2 Tr. 46).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

NOVEMBER 1987